



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTION & HUMAN RIGHTS DIVISION

PETITION NO 303 OF 2012

BRYSON MANGLA AGOTPETITIONER

VERSUS

NANCY MAKOKHA BARAZA1ST RESPONDENT

JUDICIAL SERVICE COMMISSION2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

**THE HONOURABLE ATTORNEY GENERAL.....4TH
RESPONDENT**

JUDGMENT

1. The petitioner has filed this matter alleging violation of his constitutional rights and fundamental freedoms against the respondents. The genesis of the petition appears to be long standing grievances that he has against various persons and entities, among them state and state officers, religious leaders and religious institution.

The Petitioner's Case

2. The petitioner contends that the respondents have, through their actions and omissions, violated his constitutional rights under Articles 27, 28, 29, 33, 47 and 48 of the Constitution. The alleged acts that constitute such violations are set out in his affidavit sworn on 18th July 2012 in support of his initial petition.
3. In the said affidavit, the petitioner avers that on 20th September 2011, he visited the Supreme Court Building to pursue an appointment with the Honourable Chief Justice which he states was to be arranged and coordinated by the 1st respondent, then the Deputy Chief Justice of Kenya. The reason for the intended visit to the Chief Justice was to obtain legal representation which he had

requested for in a letter to the Chief Justice to enable him pursue redress for numerous complaints of infringement of his basic rights with respect to what the petitioner terms as '**Gross Human Rights Abuse, Deprivation, Perpetual Defamation & Conspiracy by the CID & Other state organs**' and being termed an enemy of the people for '**exposing CID & Building Industry Corruption.**'

4. He avers that he was introduced by a Mr. Bidali to the 1st respondent with a view to the 1st respondent securing him an appointment with the Chief Justice; that the 1st respondent agreed to secure the said appointment, but that when she had not done so by September 2011 and after numerous phone calls, he visited her office on the morning of 20th September 2011 and entered her office unannounced.
5. He alleges that the 1st respondent called for her security officers upon which several of them entered the office and tried to remove him but he resisted removal; that the 1st respondent asked them to leave him alone and asked him to calm down and resume his seat; that he held a meeting with the 1st respondent and she agreed to secure a meeting for him with the Chief Justice; that she gave him Kshs 3000 as bus fare and gave him an appointment for 30th October 2011.
6. The petitioner alleges that he realised that the date he had been given would fall on a weekend, and he states that he attempted to return to the 1st respondent's office; that she then instructed her security officers to forcibly restrain and assault him; that he was physically assaulted by the security officers from the 1st respondent's office and taken outside the Court precincts; that he lost his phone, his suit was ruined, his spectacles broken and his suit ruined; and that in the process, he suffered physical and mental trauma, emotional distress and psychological shock for which he sought medical treatment.
7. The petitioner avers that he made a complaint to the Police at Central Police Station against the 1st respondent and Mr. Bidali and was given Central Police Station OB No. **19/18/01/2012** of **3rd February 2012**. He also alleges that he made a handwritten self-recorded statement on 18th January 2012.
8. The petitioner's complaint against the DPP is that despite his persistent follow-up, the police and the 3rd respondent failed to take any action to investigate, arrest or charge the 1st respondent, Mr. Bidali and the security officers who allegedly assaulted him.
9. He further alleges that he petitioned the 2nd respondent to petition the President to convene a constitutional Tribunal to investigate his complaint against the 1st respondent and to take action against the said Mr. Bidali but they failed to do so.

10. In light of the above facts, the petitioner seeks, in his Amended Petition dated 12th September 2012, a total of twenty three prayers and declarations including a prayer that the charging of court fees for filing constitutional petitions is a violation of his constitutional rights; declarations that the acts of the first respondent were immoral and a violation of his rights under Articles 28 and 29 of the Constitution; a declaration that the failure of the 1st-4th respondent to allow the petitioner ventilate his grievance against the 1st respondent was a violation of his rights under Article 27 to equal treatment, and equal benefit of the law; and that the failure of the 1st respondent to be civil in her dealing with him and facilitate a meeting with the Chief Justice was a violation of his right under Article 33 of the Constitution to seek, receive and impart information or ideas. He also alleges violation of his rights under Articles 47, 48 and 168 of the Constitution, and asks the court to grant him compensation of Kshs1, 196, 000,650.

The 1st Respondent's Case

11. In presenting the 1st respondent's case, Mrs. Guserwa relied on the 1st respondent's written submissions and her Answer to the Petition. The position taken by the 1st respondent is that the court should consider the state of mind of the petitioner, and that the petitioner has undergone treatment for various mental incapacities she asks the court look at the pleadings and find that the petitioner is not in a position to file any pleadings unless guided by a guardian.

12. According to the 1st respondent, she had welcomed the petitioner and even given him some money, which was inconsistent with his allegation that she had colluded with her security personnel to assault him, and that the alleged acts were criminal in nature and were still under investigations. The 1st respondent argues that this petition is made in bad faith with the intention of tarnishing her name long after she had resigned from her position as Deputy Chief Justice, and she asks that the petition be dismissed with costs.

The 2nd Respondent's Case

13. Mr. Mutua, Counsel for the 2nd respondent relied on the replying affidavit of Gladys Boss Shollei, the Chief Registrar of the Judiciary and the Secretary to the Judicial Service Commission sworn on 25th October 2012. In its submissions in opposition to the initial petition, the 2nd respondent raised three issues for consideration by the court. The first related to the claim by the petitioner that the payment of court fees was a violation of his constitutional rights. The 2nd respondent's position on this point is that Article 22(3)(c) does not impose a mandatory obligation but is discretionary, and should not be read as implying no fees should be paid.

14. With regard to the claim for legal representation by the petitioner, the 2nd respondent submits that it has no mandate, either under Article 172 of the Constitution or Section 13 of the Judicial Service Act, to provide legal representation to the petitioner or any other party. Finally, the 2nd respondent contends, with regard to the complaint by the petitioner that it failed to refer the petitioner's complaint against the 1st respondent to the President, that Article 168 sets out the procedure it should follow in such matters, and that it acts as a sieve to determine which matter

have merit and should therefore be referred to the President.

15. The 2nd respondent contends that it considered the petitioner's claim and found it to be without merit; and that the court in the case of **Nancy Barasa –vs- the Judicial Service Commission & Another High Court Petition No. 13 of 2012** had ruled that the Tribunal constituted by the President would investigate only the incident involving one Rebecca Kerubo and no other. Consequently, none of the petitioner's constitutional rights have been violated by the 2nd respondent and the petition should be dismissed with costs.

The 3rd Respondent's Case

16. Mrs. Obuo, Counsel for the 3rd respondent, relied on the affidavit of John Nderitu Kariuki sworn on 7th November 2012 and the written submissions dated 1st March 2013. The 3rd respondent concedes that a complaint was made by the petitioner by way of a letter received on 12th February 2012; the Director of Public Prosecutions wrote to the Criminal Investigations Department to investigate the matter, a fact that is acknowledged by the petitioner when he wrote to the DPP on 27th February 2012 to thank his office for its prompt action on the matter. The 3rd respondent submits therefore that there is no basis for the petitioner to allege that his office has failed to act on his complaint.

17. With regard to the petitioner's complaint that the 3rd respondent failed to arrest and prosecute those who allegedly assaulted him, the 3rd respondent submits that his office launched investigations, but before the investigations were completed, the petitioner filed this petition. The DPP contends that his office could not have ordered arrest or prosecution of any person without sufficient evidence, that to arrest and prosecute without proper evidence is against public policy; and should the investigations be complete and disclose the commission of an offence, his office will undertake the prosecutions. Mrs. Obuo relied on the decision of the court in **R –vs- A.G ex parte Kipngeno Arap Ngeny** on the need for there to be material evidence to warrant a prosecution. She submitted that investigations would have been complete had there not been an interruption occasioned by this petition.

18. To the allegation by the petitioner that the 3rd respondent had violated his constitutional rights, Mrs. Obuo submitted that a perusal of the Amended Petition and the affidavit in support of the petition revealed no violation of the petitioner's rights, and she asked that the petition be dismissed with costs.

The 4th Respondent's Case

19. Like the other respondents, the 4th respondent took the position that this petition lacks merit, discloses no violation of the petitioner's rights, and should be dismissed with costs. In his submissions on behalf of the 4th respondent, Mr. Waigi, learned State Counsel, while associating himself with the submissions of the 1st - 3rd respondents, relied on the 4th respondent's grounds of opposition dated 4th December, 2012 and the written submissions dated 30th April 2013.

20. It was the 4th respondent's position that the petitioner had not identified any particular breach of his fundamental rights; that he had only given a long history spanning over eighteen years during which he alleged that violation of his rights had occurred, but had not indicated the date on which such violations occurred, the entity that committed such violations, and how his rights were violated. He had thus not complied with the requirement that a party alleging violation of rights must set out with precision the constitutional provisions violated and the manner of violation with respect to him. Mr. Waigi relied on the dicta in the case of **Anarita Karimi Njeru (1976-80) 1 KLR 1272** and asked that the petition be dismissed with costs.

Determination

21. Article 22 of the Constitution gives to everyone the right to institute proceedings alleging that a right or fundamental freedom has been infringed, violated or threatened with violation, while Article 159 confers judicial authority on the courts and imposes a duty on the court to hear and determine disputes which come before it. Article 165(3) vests in the High Court jurisdiction to hear and determine whether a right or fundamental freedom has been violated.

22. The 1st respondent contends that the court should not entertain this petition as there are questions about the mental state of the petitioner, borne out by the fact that he has received psychiatric treatment over the years. However, the petitioner has filed pleadings that are coherent enough for all the parties to this petition to have responded, based on an actual event. While not making any findings with regard to the mental state of the petitioner, which this court is not qualified to do, I am of the view that the interests of justice dictate that I examine such of the petitioner's averments and pleadings that would fall within the rubric of what this court has jurisdiction to determine.

23. As submitted by Mr. Waigi for the 4th respondent, the petitioner has raised many issues pertaining to events, wrongs and alleged violations spanning a period of over eighteen years. He alleges that he had a bright future as he had risen in employment to the position of a General Manager with very high earnings; that he was deprived of income from various companies between 1994 and 1998; and that he was subjected to various other violations by the church, the Criminal Investigations Department and psychiatrists who were treating him.

24. From the pleadings and evidence that he has presented to this court, the petitioner does appear to be a somewhat troubled man. However, the only issue that this court can properly address itself to is whether there was any violation of the petitioner's rights in the incident that allegedly took place at the offices of the 1st respondent on the 20th of September 2011.

25. The petitioner alleges that he was assaulted in the said office; that the 2nd respondent refused to forward his complaint to the President for the purpose of establishment of a tribunal to investigate the 1st respondent, and that the 3rd respondent has refused to arrest and prosecute the 1st respondent and the security officers who allegedly assaulted him.

26. On the facts before me, I cannot find any basis for alleging that the 1st respondent assaulted the petitioner. From his own averments, he entered her office without authorisation, but despite this,

she was cordial to him, and even gave him cash amounting to Kshs 3000. It appears, again from the petitioner's own averments in his affidavit in support of his petition, that he was forcibly removed from the court premises after he attempted to make his way back to the office of the 1st respondent. In the circumstances, I am unable to find that the 1st respondent in any way violated the constitutional rights of petitioner.

27. The petitioner alleges violation of his rights by the 2nd respondent because it failed to refer his complaint to the President for the purpose of constituting a tribunal to investigate the conduct of the 1st respondent. Article **168(2)** of the Constitution provides that the removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person, (JSC) while **Section 14** of the **Judicial Service Act, 2011** gives the JSC the power to consider and evaluate any complaints against a judge and determine whether the complaints disclose any of the grounds stipulated in **Article 168(1)** of the Constitution. In the present case, the 2nd respondent has submitted that it considered the petitioner's complaint and found it to be without merit; and that the High Court had already decreed in **Petition No 23 of 2012** that the Tribunal appointed to investigate the conduct of the 1st respondent could only deal with the incident at Village Market involving Rebecca Kerubo.

28. I must again express my inability to find any basis for faulting the decision of the 2nd respondent with regard to the petitioner's complaint. The alleged events that the petitioner complains about took place in September 2011, yet it was not until January 2012 that the petitioner thought it fit to lodge his complaint. The 2nd respondent considered the matter and determined that there was no merit in the petition; the High Court had ruled in the petition filed by the 1st respondent that only one petition could be investigated by the tribunal, and nothing has been presented before me by the petitioner to support his allegation of violation of his rights by the 2nd respondent.

29. With regard to the complaint against the 3rd respondent, the evidence before me indicates that the DPP put in motion the process of investigation of the petitioner's complaint, something that the petitioner has acknowledged in the letter dated 27th February 2012 annexed to his petition as 'BMA 22,' in which he thanks the 3rd respondent and indicates that he has already been contacted by a Mr. John Mwangi from the Criminal Investigations Department.

30. The 3rd respondent has deponed, in the affidavit of SSP Kariuki Nderitu, that his office commenced investigation of the incident through **Inquiry File Number 57 of 2012** which relates to the petitioner's complaint. The 3rd respondent confirms that the complaint was received on 18th January 2012; that investigations commenced and that statements have been recorded from the complainant and other people who were in the vicinity at the time of the incident. The 3rd respondent confirms that although the petitioner reported the incident some four months after it allegedly occurred, its officers have nonetheless been in the process of investigating the incident as they deem it to be of a serious nature.

31. The 3rd respondent has the constitutional mandate to direct the investigation of alleged offences, and carry out prosecutions, without interference from any party. Article 157(10) provides that:

'The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.'

32. I am unable, on the material before me, to find any basis for alleging violation of the petitioner's rights by the 3rd respondent. His office has set in motion the process of investigating, the alleged assault, and the petitioner appears to have jumped the gun by pre-empting the actions of the 3rd respondent with regard to the alleged assault upon him. It may be that the investigations would have revealed the commission of a criminal offence, or maybe not. As matters now stand, there is no basis for faulting the acts of the 3rd respondent with regard to the petitioner.

33. However, it is important that the investigations undertaken by the 3rd respondent into the alleged assault continue to completion in accordance with the 3rd respondent's constitutional mandate, and should they disclose the commission of any offence, the necessary prosecution undertaken.

34. In any event, for the reasons set out above, this petition is dismissed but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 5th day of July 2013

MUMBI NGUGI

JUDGE

Mr. Bryson Mangla Agot, Petitioner in person

Mrs. Guserwa instructed by the firm of J.A. Guserwa & Co. Advocates for the 1st Respondent

Mr Mutua instructed by the firm of Issa & Company for the 2nd Respondent

Mrs Obuo instructed by the Director of Public Prosecutions for the 3rd Respondent

Mr. Waigi Kamau, Litigation Counsel, instructed by the State Law Office for the 4th Respondent